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Supreme Court of the United States

October Term, ~~1970~~

No. ~~316~~ 69-6

UNIFORMED SANITATION MEN ASSOCIATION, INC., *et al.*,
Petitioners,

against

COMMISSIONER OF SANITATION OF THE CITY OF NEW YORK, *et al.*,
Respondents.

PETITIONERS' REPLY BRIEF

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The respondents' brief in opposition ignores the important and still unresolved questions raised in the petition for certiorari. It also misconstrues the law as it applies to this case.

1. Respondents in their brief (pp. 9-13) have totally avoided any discussion of *Counselman* v. *Hitchcock*, 142 U.S. 547, and the unresolved question of whether transactional immunity is constitutionally required before persons may be required to waive their privilege against self-incrimination. The commentators have recognized that the issue is still an open one;[1] more importantly, so have several members of this Court, see Justices Harlan and Stewart concurring in *Stevens* v. *Marks*, 383 U.S. 234, 249.

We believe that upon plenary consideration, it can be established that for historical and practical reasons transaction immunity is required and that the broad principle

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[1] See e.g. *Federal Immunity Statutes: Problems and Proposals*, 37 Geo. Washington L. Rev. 1276 (1969).

stated in *Counselman* v. *Hitchcock*, should be reaffirmed. In any event, this is obviously an important issue which affects the federal as well as state governments not only in their relationship to their employees, but to all citizens interrogated in criminal and administrative investigations.

2. Respondents, instead, claim that the procedures they adopted here complied with dicta in this Court's recent decisions in *Garrity* v. *New Jersey*, 385 U.S. 493; *Gardner* v. *Broderick*, 392 U.S. 273, and *Uniformed Sanitation Men Association* v. *Commissioner of Sanitation*, 392 U.S. 280. Those cases do not support respondents' position. *Gardner* and *Sanitation*, although setting forth a general procedure to be followed by public employers in questioning their employees, do not discuss the question of transactional immunity nor do they authorize a deputy administrator of a city agency, who has no authority under applicable state law to grant *any* immunity, to grant a limited immunity in direct violation of a statute requiring absolute immunity. The question of what type of immunity is required by the Constitution was not involved in either of those cases.

This Court's hypothetical question in *Gardner*, "if New York had demanded that petitioners answer questions . . .", does not help respondents, for here New York made so such demand; a state speaks through its legislature and New York's legislation does not give the deputy administrator power to grant any immunity.[2]

Respondents' reliance (Br., p. 11) on *Garrity* is similarly misplaced since *Garrity* provides a method for insuring that one who initially submitted to an unconstitutional demand would be ultimately protected. This was recognized by the State of New Jersey which, following *Garrity*, passed a statute establishing a State Commission of Investigation with power to confer immunity on witnesses assert-

[2] The inapplicability of *Sanitation* to this case is discussed in the petition at page 9.

ing their Fifth Amendment privilege. N.J. Rev. Stat., § 52 9M-17.[3]

Although petitioners agree with respondents' assertion (Br., p. 10) that "the City as an employer also has rights", these rights must be asserted in compliance with, not in direct violation of, applicable state law.

3. Respondents have also failed to answer petitioners' argument that *Erie* v. *Tompkins*, 304 U.S. 64, and the principle of federalism required the court below, as Judge Tyler in the District Court recognized, to apply New York's Immunity Law. The respondents' apparent rationale for ignoring *Erie* is that "[n]either absolute transactional immunity nor statute is required to obtain the formal 'immunity' in question here under New York decisions" (Br., p. 12). In making such an assertion, the respondents have ignored (1) *Matter of Gold* v. *Menna*, 25 N.Y. 2d 475 (1969), requiring transactional immunity under New York law and (2) New York Code of Criminal Procedure, § 619-c(4), which directs that "[i]mmunity shall not be conferred upon any person except in accordance with the provisions of this section."

The respondents' citations (Br., p. 12) of *Application of Second Additional Grand Jury of the County of Kings*, 10 A.D. 2d 425 (1960), *aff'd* 8 N.Y. 2d 220 (1960), and *People* v. *Ryan*, 11 A.D. 2d 155 (1960), are inapposite. In the former case a witness refused to answer questions before a grand jury even though offered immunity. The court held that having been offered immunity as provided by statute the witness had no excuse for not answering. In the latter case, the court refused to dismiss an indictment on the ground that a defendant's testimony before a previous

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[3] Respondents' citation (Br., pp. 11-12) of *Murphy* v. *Waterfront Commission*, 378 U.S. 52, as being dispositive of the issue of transactional immunity ignores the fact that several members of this Court in *Stevens* v. *Marks*, *supra*, stated that the issue was still open.

grand jury had furnished leads to the indictment returned by a later grand jury. In the course of its opinion, the court stated, as this Court had held in *Garrity*, that if the defendant had been illegally examined before the grand jury, his testimony could not later be used against him.

Mapp v. *Ohio*, 367 U.S. 643, and *Miranda* v. *Arizona*, 484 U.S. 486, cited by respondents (Br., p. 12), are also not point, for there this Court applied an exclusionary rule to protect a defendant whose constitutional rights had been violated. They do not constitute an acquiescence by this Court in the illegal action of the officials involved. In short, none of the cases cited by respondents require petitioners here to yield initially to an unconstitutional demand that they answer questions solely because their testimony might ultimately be ruled inadmissible by a court.

4. Respondents claim (Br., p. 15) that the wiretapping engaged in here "was not the source of any questions" asked of petitioners since the attorneys who framed the questions only spoke to police officers who had made visual observations of the East 91st Street Marine Transfer Station where petitioners worked. However, the illegal wiretapping clearly was the source of the interrogation which did not take place until after the wiretapping had occurred. The mere fact that respondents' counsel had conversations with police officers in the course of which they refrained from mentioning the illegal wiretapping did not insulate these disciplinary hearings from the prior illegal wiretapping. The respondents and their counsel were well aware of the wiretapping which led to the original investigations and which was the subject of litigation in this Court. The present disciplinary proceedings are a continuation of the original investigations which themselves were based upon information secured by the wiretapping. Respondents' argument is therefore in conflict with the principle laid down by this Court in the second *Nardone* case. *Nardone* v. *United States*, 308 U.S. 338.

The cases cited by respondents (Br., pp. 14-15) regarding the legality of an employer's interception of telephone conversations of its employees are in conflict with the cases cited by petitioners (Pet. Br., p. 18). Since this Court has never passed upon the question of whether the Federal Communications Act is violated when an employer wiretaps the conversations of its employees, this is an additional reason for the granting of certiorari in this case.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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August 27, 1970